82-1340

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

COMPANIA DE GAS DE NUEVO LAREDO, S.A.,
PETITIONER

VS.

ENTEX, INC.,
RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit err in holding that the act of state doctrine precluded consideration of Petitioner's claim that Respondent conspired with the government of Mexico to unlawfully take control of Petitioner's assets when in fact the Mexican Government waived the act of state defense by sending Petitioner a letter allowing it to prosecute causes of action "before any authority, whether it be National or Foreign" and authorizing Appellant "to initiate efforts to terminate said possession", and in holding that an exception to the act of state doctrine does not exist when governmental acts in question were procured through corruption?

2. Did the United States Court of Appeals for the Fifth Circuit err in not holding that the Texas Railroad Commission's Interim Order of September 27, 1973, in Docket 500, does not affect the price of natural gas sold to Appellant because it is gas sold in foreign commerce?

3. Did the United States Court of Appeals for the Fifth Circuit err in holding that Respondent had no fiduciary duty and obligation under its implied covenant of good faith and fair dealing to attempt to collect from United Gas Pipeline Co., a guarantor, before passing through increases in cost of gas to Petitioner?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, pp. App. 1-26) is unreported. The opinion of the United States District Court for the Southern District of Texas, Laredo Division, (Appendix B infra, pp. App. 27-28) is unreported. The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Texas, Laredo Division (Appendix C, infra, pp. App. 29-56) is unreported.

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Rehearing was entered on October 21, 1982 (Appendix D , infra, pp. App. 57). The jurisdiction of this Court is invoked under 28 U.S.C. 2101(c).

STATUTORY AND CONTRACTUAL PROVISIONS

The pertinent provisions of the statutes, the contract and the letter from the Mexican Government involved are set forth in Appendix E , infra, pp. App 58-70 .

STATEMENT OF FACT

At the time the suit arose, Petitioner was a privately owned company organized under the laws of Mexico, and was engaged in supplying gas to the City of Nuevo Laredo in the Republic of Mexico. Respondent, an American natural gas distributing company operating mainly in intrastate commerce in Texas, Louisiana, and Mississippi, had a long-standing contract to export gas to Petitioner. Petitioner and Respondent's predecessor, United Gas Corporation, entered into a contract on May 26, 1944, whereby United Gas Corporation would sell gas to Petitioner for distribution and consumption in the Republic of Mexico. On January 26, 1945, the Federal Power Commission,1/ in Docket No. G-103, entered its Order authorizing the exportation of natural gas from the United States

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1/ The Federal Power Commission was the predecessor of the Federal Energy Regulatory Commission. For simplicity, both will be referred to as "the Commission."

to a foreign country, said authorization being pursuant to and in accordance with the terms and conditions of the contract dated May 26, 1944 between the United Gas Corporation and Petitioner. The contract was subsequently assigned by United Gas Corporation to United Gas, Inc., which later changed its name to Entex, Inc.

The parties (or their predecessor) amended2/ the 1944 contract several times.3/

2/ The Commission did not approve or review any of these amendments. Indeed most were not filed with the Commission. Only the 1944 contract was approved. The Respondent, a United States corporation, had the burden to file any increases in its price of gas sold to Petitioner with the Commission. In the situation at bar, Respondent is presumed to have a greater knowledge than Petitioner in matters relating to the regulatory pre-requisites and requirements of the Commission, a United States entity. This point is important because of the "filed rate" doctrine which is raised later in this petition.

3/ All contracts, amendments and supplemental agreements between Petitioner and Respondent or Respondent's predecessor were prepared by Respondent, Respondent's predecessor or their attorneys.

As amended, section VII of the contract, which governed the rate to be paid for the gas sold under the terms of the contract, called for a "base rate."4/ Any increase or decrease in the base rate was to become effective in sixty days after the seller advised the buyer to that effect in writing. The buyer had the right, after February 1, 1973, to terminate the contract by written notice to seller not less than thirty days prior to the date the increase was to take effect. The seller also had the right to suspend deliveries of gas upon a breach by giving the buyer a similar notice in writing.

A 1968 amendment included "pass through" provisions which allowed the seller to adjust the base rate upward or downward to reflect, inter alia, the cost of its gas purchases. These pass through adjustments were included in the fixed rate automatically, and did not require the sixty

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4/ The base rate was initially fixed at $.34 per 1000 cubic feet of gas (Mcf), and was increased to $.54 per Mcf in 1975.

days written notice for a rate increase or decrease.

On June 25, 1970, the Commission, in Docket No. CP 70-262, issued its Permit authorizing the Respondent's predecessor to continue to operate and maintain the facilities on the U. S. Mexico Border at Laredo, for exportation of gas but ". . . only in the amount, at the rate, and in the manner authorized by the Commission. . ." No effort has been made by Respondent to have the Commission approve an increase in the 1944 rate.

In 1973, the Texas Railroad Commission, in Docket 500, voided Respondents' contracts with its supplier, the Lo-Vaca Gathering Company ("Lo-Vaca"), and substituted a price formula substantially raising the cost of gas to all of Lo-Vaca's customers, including Respondent. Respondent in turn "pass through" these increases to Petitioner, resulting in a substantial rise in the cost of gas to Petitioner. Petitioner became delinquent in its account with Respondent beginning in 1974. On February 25,

1975, Respondent gave Petitioner sixty (60) days' notice in writing, pursuant to the terms of the contract, of a rate increase to $.54 per Mcf. Said rate increase was not approved by the Commission. By 1976, the arrearage had become significant, and Respondent sent a letter to Petitioner and to various officials of the Mexican government on the federal and state levels informing them that, unless the account was paid for, Respondent intended to suspend deliveries of gas.

On the date before Respondent was to suspend service, Petitioner filed suit in the United States Court for the Southern District of Texas to enjoin Respondent from suspending gas deliveries. The Court temporarily restrained Respondent from discontinuing its gas deliveries. Petitioner, however, was required to post bond to cover such future deliveries of gas. In the meantime, Pemex, Mexico's government-owned and operated petroleum gas corporation, began supplying gas to Petitioner, thereby reducing the demand for imported gas. Moreover, on July 13, 1976, the Mexican government appointed an

"intervenor" and took immediate, total, and temporary possession of Petitioner's assets and rights in Mexico. On July 23, 1976, Petitioner filed a complaint with the Commission seeking to prohibit Respondent from terminating service. On August 18, 1976, the District Court for the Southern District of Texas stayed the suit against Respondent pending the outcome of the administrative proceeding.

On February 15, 1977, the Administrative Law Judge ("ALJ") ruled against the Petitioner. On Appeal, the District of Columbia Court of Appeals affirmed the ALJ's holding. Compania De Gas, etc. vs. Federal Energy Regulatory Commission, 606 F.2d 1024 (D.C.Cir. 1979).

Following resolution of the proceedings in the District of Columbia, the initial suit in Texas proceeded on both the tort and the contract claims. Petitioner claimed, among other points, that: (1) Respondent conspired unlawfully with various officials of the Republic of Mexico to obtain control of Pettitioner's assets. (2) The Texas Railraod Commission's order in Docket 500 had no effect on the price of gas charged to Petitioner, because of its foreign

commerce nature. (3) The pass-through provision was unconscionable in violation of Texas commercial law. (4) Respondent had a duty to seek and collect the rate increases from Lo-Vaca's predecessor, United Gas Pipeline, a guarantor, before it passed them on to Petitioner.

On October 7, 1980, the district court granted Respondent's motion to dismiss the tort claim, holding that the act of state doctrine barred all inquiries into the alleged conspiracy. Following a trial on the contract claims, the court, on February 17, 1981, denied all relief to Petitioner, and granted Entex's counterclaim for $937,035.18 for overdue payment, together with $297,723.70 in accrued interest, and $5,000.00 in attorney's fees.

On April 25, 1981, Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. On September 24, 1982, said Court of Appeals affirmed the district court. Petitioner timely petitioned for a rehearing and on October 21, 1982, said Court of Appeals denied Petitioner's request for rehearing. Petitioner now submits this its Petition for Certiorari to this Honorable Supreme Court of the United States of America.

EXISTENCE OF JURISDICTION BELOW

Petitioner filed its Original Complaint for accounting and injunction on June 30, 1976 in the District Court for the Southern District of Texas, Laredo Division. Jurisdiction was founded on 28 USCA §1332 in that there existed complete diversity of citizenship between Petition and Respondent and the matter in controversy exceeds $10,000.00, exclusive of interest and costs.

REASONS FOR GRANTING THE WRIT

In this case there are several important questions of federal law which have not been, but should be, settled by this Court.

I.

The first important question of federal law that needs to be reviewed by this Court involves the act of state doctrine. Respondent submits to this Court that when governmental acts in question are procured through corruption then an exception to the act of state doctrine exists.

In Dominicus Americano Bohio v. Gulf & Western Industries, Inc., 473 F.Supp. 680 (S.S.N.Y. 1979),

an individual and a number of corporations affiliated in an endeavor to establish hotel and condominium accommodation in the La Romana section of the Dominican Republic sued competitor, latter's subsidiaries and the Dominican Tourist Information Center, and among other things alleged Sherman Act violations. The Court held that the act of state doctrine would not apply if it is alleged that the government's acts in question were procured through corruption. See Hunt v. Mobil Oil Corp. , 550 F.2d 68 at 79; McManis, "Questionable Co porate Payments Abroad: An Antitrust Approach", 86 YALE L.J. 215 (1976) at 236-237; Note, "Sherman Act Jurisdiction and the Acts of Foreign Sovereigns", 77 COLUM.L.REV. 1247 (1977) at 1262. In the present case, Respondent conspired with officials of the Republic of Mexico to unlawfully take control of Petitioner's assets. Therefore, the act of state doctrine should not apply because of the acts of corruption involved.

But the court of appeals below like the Hunt court refuses to address the merits of the corruption acts issue, and simply concludes (in order to avoid the corruption acts issue) that the Mexican

government, by taking possession of Petitioner's assets, acted in an emergency to insure that the citizens of Nuevo Laredo receive uninterrupted service of natural gas.

There have been at least two courts of appeal that have dodged the issue of corruption as an exception to the act of state doctrine. Since the courts of appeal across our nation keep dodging this issue, it is time for this Court to review this matter.

The policy underlying the act of state doctrine is that courts should abstain from action which hinders the executive branch of the government in the conduct of foreign relations and which might imperil amicable relations with other nations. Oetjen v. Central Leather Co. 246 U.S. 297, 62 LED 726, 38 S.Ct. 309; Jimenez v. Aristequieta 311 F.2d 547 (5th. Cir., FLA) stay den, 314 F.2d 649; cert den 373 US 914, 10 LED 2d 415, 83 S.Ct. 1302; reh den 374 US 858, 10 LED 2d 1083, 83 S.Ct. 1867. If this Court holds that an exception of the act of state doctrine exists when governmental acts in

question are procured through corruption, then this might even enhance relations with other nations in that nations, through their civil courts, will be able to fight, or at least expose, corruption in governmental posts. At the other extreme, allowing this exception will not more imperil amicable relations with other nations than does the Corrupt Practices Act (CPA).5/ In fact, the CPA is in part the very same exception to the act of state doctrine that Petitioner is requesting this Court to hold -- the issue of governmental acts in question procured through corruption--except that the CPA involves criminal proceedings. Petitioner would submit to this Court that under the CPA, the U.S. Justice Department would do more harm to international relations than would the corruption action exception Petition is seeking because the CPA involves criminal proceedings which includes the investigation and prosecution of foreign governmental officials.

It is ironical that the court of appeals below would, at this time, refuse to address the

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5/ Pub. L. No. 95-213, 91 Stat. 1494 (1977) codified in scattered sections of 15 U.S.C.).

corruption action exception Petitioner is currently seeking, when at this very same time, the Southern District of Texas is using the CPA to investigate and prosecute Petroleos Mexicanos (Pemex) officials involved in accepting bribes from a United States company. Is it fair and just that only the U.S. Justice Department, under the CPA, can have an exception to the act of state doctrine to investigate and prosecute corrupt foreign officials in criminal proceedings and yet in the very same type of corrupt actions, a company does not have recourse to civilly sue foreign officials involved in corruption? Should Respondent be allowed to hide from judicial inquiry of the corruption allegation because of act of state doctrine? Petitioner unequivocally says no to this special and important question of federal law, especially at this time that the United States and the Republic of Mexico (President Miguel de la Madrid's recent pronouncements on his goal to fight corruption in Mexico) are so concerned about corruption in governmental posts. An exception to the act of state doctrine must exist when governmental acts in question are procured through corruption.

It is important that this Court hold that a foreign state can voluntarily waive the act of state doctrine and thus allow another state's courts to take judicial inquiry into the validity or propriety of the acts of said foreign state. In the present case, the Republic of Mexico has unequivocally consented to an inquiry into the seizure of Petitioner's assets in its letter to Petitioner. (App. E , infra, pp. App 67-70). The letter not only authorizes Petitioner to "prosecute causes of action "before any authority whether it be National or Foreign", but also authorizes it "to initiate efforts to terminate said possession" which refers to the seizure. The court of appeal below has overlooked the last phrase of said letter granting such authority. Any such efforts to terminate said seizure obviously involves an inquiry into the validity of the act of the foreign government. Petitioner has been authorized to do just that before "any authority whether it be National or Foreign". The Republic of Mexico has unequivocally consented to such an inquiry by any United States court,

which, of course, includes this Court.

Application of the act of state doctrine, in this case, only benefits the wrongdoer, Respondent who procured such seizure through corruption. This is clearly not the underlying policy of the act of state doctrine.

The court of appeal below states that the clear and unambiguous statement by the Mexican government that it would not object to a judicial examination of its public act is but one of the many factors considered by courts in determining the applicability of the act of state doctrine. Why should other factors be taken in consideration when the Mexican government itself has unequivocally consented to an inquiry to its actions by any United States court?

The court of appeals below also holds that the facts of this case indicate that the letter cited by Petitioner does not constitute a waiver of the act of state defense by the Mexican government. The court of appeals does not specifically state what facts of the case indicate that said letter does not constitute a waiver of

the acts of state doctrine by the Mexican government. Petitioner cannot find the "facts of the case" that support the court of appeal's conclusion. The letter is the fact of the case that constitutes a waiver of the act of state doctrine by the Mexican government.

Furthermore, if there is still a question of the meaning of said letter, the Mexican government should be allowed to elaborate or explain the contents by making a general appearance at a United States court. The case of D'Angelo v. Petroleos Mexicanos, 331 A.2d 388, holds that a foreign state will be required to make a general appearance and is entitled to a defense based upon the act of state doctrine, but only when it pleads and proves that such defense is applicable. Petitioner contends this is the proper approach that must be taken by United States courts. The Mexican government should be required to make a general appearance in a United States court and only there it should plead and prove that the act of state doctrine is applicable if it so desires because in this case it has already waived said act by the letter that allows any

authority, be it national or foreign, to inquire into the acts of the Mexican government involving the seizure of Petitioner's assets.

II.

Another important question of federal law that needs to be settled by this Court involves the issue of federal preemption over natural gas prices sold in foreign commerce.

The Respondent charged the Petitioner more than the contract price for gas delivered to the Petitioner apparently because of the Order in Docket 500 of the Railroad Commission of the State of Texas. However, the Natural Gas Act, 15 USCA §717 et seq. preempts regulatory powers over the transportation and sale of natural gas in interstate and foreign commerce. Public Utilities Commission v. United Fuel Gas Co., 317 U.S 456 LED 396. The Railroad Commission of the State of Texas, therefore, has no authority over gas sold to the Petitioner, same being in foreign commerce. Just as a State has no authority, either directly or indirectly, to fix prices at which natural gas is sold in inter-

state commerce, See Natural Gas Act, 15 USCA §717 et seq; U.S. CONST. art. 1, §8, cl. 3 (Commerce Clause); and Federal Power Commission v. The Corporation Commission of the State of Oklahoma 363 F.Supp. 522 (1973), a State has no authority, either directly or indirectly, to fix prices at which natural gas is sold in foreign commerce.6/ It follows, therefore, that the September 27, 1973 order of the Texas Railroad Commission can have no effect on gas sold to the Petitioner; only an order of the Federal Power Commission (hereinafter known as the Commission) can affect such gas.

On January 26, 1945, the Commission, in Docket No. G-103, entered its Order authorizing the

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6/ In largest part, the cases defining the implied prohibitions of the Commerce Clause deal with State regulation of interstate commerce, since most States have greater opportunities and temptations to impinge on commerce with other States than with foreign countries. But nothing in the cases suggests, and there is no reason to believe, that they do not apply equally to foreign commerce. Perhaps a fortiori, and perhaps the limitations on the States would be more stringent in regard to foreign commerce. Further, some of the cases that define what the Commerce Clause required of the States in fact involved foreign commerce. See, City of New York v. Miln 11 Pet. 102 (U.S. 1837) and The License Case 5 How. 504 (U.S. 1847).

exportation of natural gas from the United States to a foreign country, said authorization being pursuant to and in accordance with the terms and and conditions of the contract dated May 26, 1944 between United Gas Corporation and Petitioner.

On June 25, 1970, the Commission, in Docket No. CD70-262, issued its Permit authorizing the Respondent's predecessor to continue to operate and maintain the facilities on the U.S. Mexico Border at Laredo, for exportation of gas but ". . . only in the amount, at the rate, and in the manner authorized by the Commission..." (Emphasis added).

More importantly, the recent case of Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed 2d 856 (1981), holds that under the "filed rate doctrine", a regulated entity is forbidden from charging rates for its services other than those properly filed with the appropriate federal regulatory authority.7/ In the present

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7/ In this case, the appropriate federal regulatory authority is the Federal Energy Regulatory Commission (the Federal Power Commission's successor).

case, the only filed and approved rate establishing the amount to be charged for said gas was filed in 1944. No effort was made by Respondent to have the Commission approve an increase to the 1944 rate. It is not the Petitioner's fault that Respondent slept on its rights. Therefore, under the filed rate doctrine, Respondent has overcharged Petitioner because the 1944 rate is the only rate filed with the Commission. Furthermore, Arkansas Louisiana Gas Company holds that when there is a conflict between the rate filed with the Commision and a contract rate, the file rate controls.

Furthermore, Title 15 §717(a), USCA provides:

". . . the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. June 21, 1978, c. 556, § 1, 52 Stat. 821; March 27, 1954, c. 115 68 Stat." (Emphasis added)

Title 15 §717b, USCA provides:

"After six months from June 21, 1938 no person shall export any natural gas from the

United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate. June 21, 1938, c. 556, §3, 52 State. 822." (Emphasis added).

International trade and intercourse are commonly regulated by federal statute or treaty, and these are supreme law binding on the States. The United States Supreme Court has held that in addressing to Congress the power "to regulate commerce with foreign Nations, and among the several states," the Constitution also spoke of words of prohibition to the States. The principal case establishing this doctrine was Cooley vs. Board of Wardens of Port of Philadelphia, 12 How. 299 (1851). The Constitution did not leave the States wholly free to act in regard to interstate or foreign commerce until prevented by a

act of Congress, for Congress could not anticipate or deal with the myriads of state actions that might infringe the national interest.

Though section 717(b) of the National Gas Act states that the Act's provisions apply to natural gas in interstate commerce, sections 717(a) and 717(b) of the Act and the Cooley doctrine lead to the logical conclusion that the Commission has the authority to regulate gas flowing in not only interstate commerce but, also in foreign commerce. This Court must settle the important question of federal law which involves the preemption of state law by federal law when gas is sold in foreign commerce. International trade should be regulated by federal statute or treaty and these should be supreme law binding on the States, even in the sale of gas across international boundaries. Furthermore, the Commerce Clause of the United States Constitution must be respected and adhered to by a state gas agency. The Commerce Clause limits the States from infringing on foreign commerce. This Court must reiterate these principles.

III.

There is one more important question of federal law that must be reviewed by this Court. Petitioner submits to this Court that Respondent had a duty to attempt to collect the increases in the price of gas from the predecessor of Lo-Vaca, United Pipeline, Inc., before it passed such increases to Petitioner, and further, that because it had not made any such attempt, it could not collect the increases. Petitioner contends that such a duty arises from a clause in the contract between United Gas Pipeline and Respondent, which states that if one of the parties assigned its interest to another (as United did to Lo-Vaca), then that party would cause the acquiring entity to faithfully perform all the obligations created by the contract.

Respondent as a seller of the natural gas to Petitioner, the buyer, had a fiduciary duty to attempt to collect from United Gas Pipeline Co. before passing through increases in cost of gas to Petitioner. Respondent did not receive a "blank-check" from Petitioner.

United Gas Pipeline Co.'s contract with United Gas Corporation, Respondent's predecessor, states as follows:

"If all or any part of Seller's pipeline system through which the gas hereunder is delivered to Buyer is voluntarily sold or exchanged by Seller and Seller will thereby be rendered unable to supply to Buyer any gas which it is obligated to supply hereunder, then and in such event, Seller agrees that it will cause the person, firm, or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation fully and faithfully to perform all of the obligations created by this agreement applicable to the property sold or exchanged, and Seller further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it."

This provision is a general restatement of the universal proposition that a party to a contract cannot escape its obligations by assigning the contract to another. Walker v. Mills 182 Okla. 480, 78 P2d 697; Grant v. Harver, 29 Ariz. 41, 239 P. 296; Southern P. Co. vs. Butterfield 39 Nev. 177, 154 P. 932; See 6 AM.Jr. 2d, Assignments, §110 (1963); and V.T.C.A., Bus. & C. §6.610 (a) which states:

"(a) A party may perform his duty through a delegate unless otherwise agreed or unless the

other party has substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach."

More importantly, the contract provision, supra, is clearly a guarantee by United Gas Pipeline Co. to Respondent's predecessor, United Gas Corporation. The assignor becomes a guarantor of the assignee's performance. The court of appeal below properly recognized this point in its opinion.

27 Tex.Jur. 2d, Guaranty §1 (1961 and Supp. 1980) defines "Guaranty" as

> ". . . a promise of one person to perform an act of the same content and kind as another is contractually bound to the promisee to perform, or a promise to pay compensation for the other's performance, the promise being conditional on the latter's nonfulfilment of his duty."

It is, therefore, clear that when United Gas Pipeline Co. assigned its contract to Lo-Vaca Gathering Company, it was and is obligated to Respondent for Lo-Vaca's performance. Since Lo-Vaca breached the contract, Respondent has recourse against United Gas Pipeline Co. under the above quoted contract provisions and statutory authority.

Respondent's cost of gas, therefore, should not increase unless and until such time as it exhausted all efforts to collect on the guarantee of United Gas Pipeline Co. and was unable to collect.

Furthermore, at the time the "pass through clause" was added to Petitioner's contract, all the parties were familiar with Respondent's long term contract for gas at a fixed price and it was with this knowledge of the surrounding circumstances and the fact that it had no alternative source of gas that Petitioner accepted such modification to its contract. Under the circumstances, it is inherently unfair to permit Respondent to impose the burden of Lo-Vaca's breach on Petitioner rather than on United Gas Pipeline who was guaranteeing such performance to Respondent. The implied covenant of good faith and fair dealing does not permit such conduct.

In Citizens Nat. Bank of Orlando vs. Vitt, 367 F.2d 541, appeal after remand, 414 F.2d 696, and in Lichter v. Mellon-Stuart Co., 193 F. Supp. 216, motion denied, 196 F. Supp. 149, aff'd., 305

F. 2d 216, the courts held that in every contract between a prime contractor and a subcontractor, the implied promise exists on part of the prime contractor that he will do nothing to prevent, interfere with, or hinder the subcontractor in this performance or increase costs thereof. In this case, there also existed an implied promise on part of the Respondent: to attempt to keep the costs of gas from increasing and to attempt to collect from United Gas Pipeline Co. before passing through increases in cost of gas to the Petitioner. By not attempting to collect from United Gas Pipeline Co., Respondent breached its fiduciary duty and implied covenant and promise of good faith and fair dealing of attempting to keep the cost of gas from increasing.

Furthermore, the "pass-through" provisions of the contract in question are not a "blank-check."

V.T.C.A., Bus. & C. §1.203 states:

> "Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement."

V.T.C.A., Bus. & C. § 1.201 (19) states:

> "'Good faith' means honesty in fact in the conduct or transaction concerned."

Respondent was under a duty to act in good faith, deal fairly and not use the "pass-through" provisions of the contract as a "blank-check".

Contrary to such duty, Respondent did not disclose the contractual guarantee to Petitioner. Petitioner, after filing this cause, learned of it in the course of discovery proceedings. Compliance with the "good faith" and "honesty" obligations imposed by law required Respondent not only to disclose such a guarantee to Petitionter but to pursue it.

The Court of appeal below holds that from the evidence presented in this case, that Respondent had no duty to attempt to collect the increases in gas prices from United Gas Pipeline for the benefit of Respondent prior to passing them through. Said court of appeal does not state what this evidence is and further does not produce any logical rationale to counter Petitioner's position. It admits it does no have any case at law to support or oppose Petitioner's position. Because of this lack of case law, it is appropriate that this Court review this special question of law since this type of situation is probably common across the nation.

CONCLUSION

This Court should review this case because of the three important questions of federal law which have not been, but should be, settled by this Court. For this reason and the above stated reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Certiorari has been mailed to Mr. Walter Workman, One Shell Plaza, Houston, Texas 77002; Mr. George Goolsby, One Shell Plaza, Houston, Texas 77002; Mr. Hubert Gentry, Entex Room 1534, P.O. Box 2628, Houston, Texas 77001; and Mr. Raymond Goodman, 518 Matamoros, Laredo, Texas 78040, on this the 18th day of January, 1983, (three copies of the foregoing Petition were sent to Mr. Walter Workman and one copy to the other counsel of record.)

C. M. ZAFFIRINI

COMPANIA DE GAS DE NUEVO LAREDO S. A., Plaintiff-Appellant,

V.

ENTEX, INC., Defendant-Appellee.

No. 81-2176

United States Court of Appeals, Fifth Circuit.

Sept. 24, 1982.

Diversity action was brought by Mexican natural gas purchaser against American natural gas exporter relating to a tort claim and a contractual dispute under the Texas Business and Commerce Code. The United States District Court for the Southern District of Texas, George P. Kazen, J., dismissed the tort claim and found the purchaser liable on its contract dispute, and the purchaser appealed. The Court of Appeals, Thornberry, Circuit Judge, held that: (1) the act of state doctrine precluded consideration of the tort claim; (2) the purchaser was collaterally estopped from relitigating in its contract claim the question of federal preemption over the price of natural gas sold by the exporter; (3) the exporter's application of clause providing for

pass through of increases in the cost of gas in its agreement with the purchaser was not unconscionable; and (4) the exporter had no duty to attempt to collect increases in gas prices from the predecessor of its supplier before passing them through to the purchaser under the clause in the supply contract requiring an assignee of the contract to faithfully perform all the obligations created by the contract.

Affirmed.

1. International Law 10.8

Whether act of state doctrine is applicable is determined by balancing several factors, namely, the degree of involvement of the foreign state, whether the validity of its laws or regulations was in issue, whether the foreign state was a named defendant, and whether there was a named defendant, and whether there was a showing of harm to American commerce.

2. International Law 10.12

Act of state doctrine precluded consideration of claim that American natural gas exporter conspired with the government of Mexico to unlawfully take control of the assets of Mexican natural

gas purchaser, where, although the government of Mexico was named a defendant, resolution of the claim would have required determination of the legality of the Mexican government's act of expropriation and where the natural gas purchaser failed to demonstrate that the alleged conspiracy in any way affected United States commerce.

3. International Law 10.9

Letter that Mexican natural gas purchaser received from the Mexican government allowing it to prosecute causes of action "before any authority, whether it be National or Foreign," did not constitute a waiver of the act of state defense by the Mexican government; rather, it merely allowed the natural gas purchaser to pursue claims which might otherwise have been foreclosed by the Mexican government's order placing the natural gas purchaser into receivorship.

4. International Law 10.12

Statutory exception to the act of state doctrine requiring a determination of the merits giving effect to the principles of international law in a case in which a claim of title or the

right to property is asserted was inapplicable, where neither the nationalized property nor its proceeds were located in United States. Foreign Assistance Act of 1961, § 620(e)(2) as amended 22 U.S.C.A. §2370 (e)(2).

5. Gas 14.3(4)

Mexican natural gas purchaser was collaterally estopped from relitigating in its contract claim against American natural gas exporter the question of federal preemption over the price of natural gas sold by the exporter, where it had had a full and fair opportunity to litigate the question before the Federal Energy Regulatory Commission in its regulatory complaint. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.

6. Gas 14. 1(3)

Fact that Mexican natural gas purchaser, at the time it signed amendment of natural gas export agreement with American exporter providing for pass through of increases in the cost of gas, had no alternative source of gas did not, by itself, render the clause or its application unconscionable in violation of the Texas Business Commercial

Code V.T.C.A., Bus. & C. § 2.302.

7. Gas 14.1(3)

American natural gas exporter's application of clause providing for pass through of increases in the cost of gas in its export agreement with Mexican purchaser was not unconscionable in violation of the Texas Business and Commercial Code. V.T.C.A., Bus. & C. § 2.302.

8. Assignments 114

American natural gas exporter had no duty to attempt to collect increases in gas prices from the predecessor of its supplier before passing them through to Mexican purchaser under the clause in the supply contract requiring an assignee of the contract to faithfully perform all the obligations created by the contract.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, REAVLEY and GARWOOD, Circuit Judges.

THORNBERRY, Circuit Judge:

I. INTRODUCTION

This is a diversity action relating to a

tort claim and a contractual dispute under the Texas Business and Commerce Code, section 2.302, between Compania de Gas de Nuevo Laredo, S.A. ("CGNL") and Entex, Inc. ("Entex"). The district court dismissed the tort claim, which alleged that Entex conspired with the Mexican government to unlawfully take control of CGNL assets in Mexico, on the basis of the act of state doctrine. The district court also found CGNL liable on its contract dispute in the amount of $1,235,658.88 plus attorney's fees. We affirm.

II. FACTS AND DISPOSITION BELOW

At the time the suit arose, CGNL was a privately owned company organized under the laws of Mexico, and was engaged in supplying gas to the City of Nuevo Laredo in the Republic of Mexico. Entex, an American natural gas distributing company operating mainly in intrastate commerce in Texas, Louisiana, and Mississippi, had a long-standing contract to export gas to CGNL. CGNL and Entex's predecessor, United Gas Corporation, entered into a contract on May 26, 1944. By order

of the Federal Power Commission ("Commission")[1] under section 3 of the Natural Gas Act, 15 U.S.C. § 717b (1976), Entex's predecessor was authorized to export gas to CGNL "in accordance with the terms and provisons" of the 1944 contract, and upon the "terms and conditions" of the order itself. United Gas Corp. 4 F.P.C. 840, 841 (1945). The contract was subsequently assigned by United Gas Corporation to United Gas, Inc., which later changed its name to Entex, Inc.

The parties (or their predecessors) amended the contract on numerous occasions.[2] As amended, section VII of the contract, which governed the rate to be paid for the gas sold under the terms of the contract, called for a "base rate."[3] Any

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1. The Federal Power Commission was the predecessor of the Federal Energy Regulatory Commission. For simplicity, both will be referred to as "the Commission."

2. The Commission did not approve or review any of these amendments. Indeed, most were not filed with the commission.

3. The base rate was initially fixed at $.34 per 1000 cubic feet of gas (Mcf), and was increased to $.54 per Mcf in 1975.

increase or decrease in the base rate was to become effective sixty days after the seller advised the buyer to that effect in writing. The buyer had the right, after February 1, 1973, to terminate the contract by written notice to seller not less than thirty days prior to the date the increase was to take effect. The seller also had the right to suspend deliveries of gas upon a breach by giving the buyer a similar notice in writing.

A 1968 amendment included "pass through" provisions which allowed the seller to adjust the base rate upward or downward to reflect, inter alia, the cost of its gas purchases. These pass through adjustments were included in the fixed rate automatically, and did not require the sixty days written notice for a rate increase or decrease. CGNL accepted this amendment without objection, and at no time prior to the suit challenged its validity or legality.

In 1973, the Texas Railroad Commission, in Docket 500, voided Entex's contracts with its supplier, the Lo-Vaca Gathering Company ("Lo-Vaca"),

and substituted a price formula substantially raising the cost of gas to all of Lo-Vaca's customers, including Entex. Entex in turn "passed through" these increases to CGNL, resulting in a substantial rise in the cost of gas to CGNL. CGNL became delinquent in its account with Entex beginning in 1974, apparently because it could not pass through all of these rate increases to its customers. By 1976, the arrearage had become significant, and Entex sent a letter to CGNL and to various officials of the Mexican government on the federal and state levels informing them that, unless the account was paid for, Entex intended to suspend deliveries in accordance with the terms of its contract.

On the day before Entex was to suspend service, CGNL filed suit in the United States District Court for the Southern District of Texas to enjoin Entex from suspending gas deliveries. Although the court refused to issue a preliminary injunction, it temporarily restained Entex from discontinuing its gas deliveries. CGNL, however, was required to post bond to cover such future

deliveries of gas. In the meantime, Pemex, Mexico's government-owned and operated petroleum gas corporation, began supply gas to CGNL, thereby reducing the demand for imported gas. Moreover, on July 13, 1976, the Mexican government appointed an "interventor" and took immediate, total, and temporary possession of CGNL assets and rights in Mexico. On July 23, 1976, CGNL filed a complaint with the Commission seeking to prohibit Entex from terminating service and requesting the Commission to determine the currently effective rate for the sale of gas to CGNL. On August 18, 1976, the District Court for the Southern District of Texas stayed the suit against Entex pending the outcome of the administrative proceeding.

The Administrative Law Judge ("ALJ") held hearings, and on February 15, 1977, concluded that, as a matter of regulatory law, the contract rate as amended was the currently effective rate, and that the 1944 rate did not apply despite Entex's failure to comply with the required filing of the price changes. On appeal, the District

of Columbia Court of Appeals affirmed the ALJ's holding on this issue. Compania de Gas, etc. v. Federal Energy Regulatory Commission, 606 F.2d 1024 (D.C.Cir. 1979).

Following resolution of the proceedings in the District of Columbia, the initial suit in Texas proceeded on both the tort and the contract claims. CGNL claimed below that: (1) Entex conspired unlawfully with various officials of the Republic of Mexico to obtain control of CGNL assets. (2) The Texas Railroad Commission had no authority to regulate CGNL's trade with Entex, and therefore, its order in Docket 500 had no effect on the price of gas charged to CGNL. (3) The pass-through provision was unconscionably in violation of Texas commercial law. (4) Entex had a duty to seek and collect the rate increases from Lo-Vaca's predecessor, United Gas Pipeline, before it passed them on to CGNL.

On October 7, 1980, the district court granted Entex's motion to dismiss the tort claim, holding that the act of state doctrine barred all inquiries into the alleged conspiracy. Following

a trial on the contract claims, the court, on February 17, 1981, denied all relief to CGNL, and granted Entex's counterclaim for $937,935.18 for overdue payment, together with $297,723.70 in accrued interest, and $5,000.00 in attorney's fees.

III. ANALYSIS

A. The Act of State Issue

CGNL claims on appeal that the act of state doctrine does not apply to the present case, and furthermore, that the Hickenlopper amendment, 22 U.S.C. §2379(e)(2) (1976), precludes Entex from invoking the doctrine.

The district court relied on Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977), in disposing of this issue. Under the holding of Hunt, the district court concluded that "the plaintiff would have to prove that 'but for' the acts of the Defendant, the Mexican government would not have put a Mexican corporation whose assets are located in Mexico into receivership. This court would thus be forced to scrutinize the motives of the Mexican Officials. Such an

inquiry is clearly barred by the act-of-state doctrine."

The most recent pronouncement of the act of state doctrine in this circuit is found in Industrial Investment Development Corp. v. Mitsui Co., Ltd., 594 F.2d 48 (5th Cir. 1979), cert. denied, 445 U.S. 903, 100 S.Ct. 1078, 63 L.Ed.2d 318 (1980). In Mitsui, we noted that the analysis in Hunt was unduly broad, and held that, in establishing a causal relation between the private violations alleged and the injuries suffered, a plaintiff was not required to establish that the defendant's acts were the sole cause of the injury. "[I]njury beyond the fact of some damage flowing from the unlawful conspiracy relates only to the amount and not the fact of damage." Id. at 55. We also held that an inquiry into the motivation of a foreign government was not as protected by the act of state doctrine as an inquiry into the validity of the foreign government's law or regulation. Id.

[1] Even such a narrow interpretation of the act of state doctrine, however, would require

the court to refrain from examining the claim of conspiracy here. As we noted in Mitusi, application of the doctrine is determined by balancing several factors, namely, the degree of involvement of the foreign state, whether the validity of its law or regulation was an issue, whether the foreign state was a named defendant, and whether there was showing of harm to American commerce. 594 F.2d at 52-53.

[2] Although the Government of Mexico is not a named defendant here, consideration of the remaining factors shows that the district court did not err in dismissing the conspiracy claim. Resolution of the charges made by CGNL would require a determination of the legality of the Mexican government's action in appointing an "interventor" to take over CGNL's operations in Nuevo Laredo, and the validity of such action under Mexican law. Furthermore, unlike the plaintiff in Mitsui, CGNL has not demonstrated that the conspiracy in any way affected United States commerce. A balancing of the competing interests involved shows that any analysis by

this court would have an adverse effect on the relations between this country and Mexico.

The Restatement (Second) of Foreign Relations Law of the United States section 41 further supports this conclusion:

> [A] court in the United States ... will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interest [emphasis added].

Illustration 6 under comment d is particularly instructive: "State A obtains by eminent domain proceedings title to an electric utility system in its territory. The vesting of title is an act of state within the meaning of the rule stated in this Section."

The district court concluded, and we agree, that the act of expropriation by the Mexican government was governmental, and not commercial. Therefore, the "purely commercial" exception to the act of state doctrine set forth in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976), does not apply.

CGNL urges that an exception to the act of state doctrine exists when the governmental acts in question were procured through corruption, and cites Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F.Supp. 680, 690 (S.D.N.Y. 1979), for support. We first note that, as the court below correctly observed, Dominicus cites the Hunt case in support of this proposition, yet, the Hunt court specifically refused to address the merits of this issue. Hunt, supra, 550 F.2d at 79. We similarly decline to address this issue. Based on the facts of this case, and viewing the record as a whole, we conclude that the Mexican government, by taking possession of CGNL assets, acted in an emergency to insure that the citizens of Nuevo Laredo receive uninterrupted service of natural gas.

CGNL also claims that a letter from the Mexican government allowing it to prosecute causes of action "before any authority, whether it be National or Foreign," constitutes an implied waiver by the Mexican government of the

act of state defense. CGNL cites no case to support its assertion that an implied waiver by an non-litigating foreign government of the act of state defense operates to deprive a private defendant from asserting the defense. Although a clear and unambiguous statement by a foreign government that it would not object to a judicial examination of a public act undertaken by it may well influence an American court, it is but one of the many factors considered by courts in determining the applicability of the act of state doctrine.[4]

[3] The facts of this case indicate, however, that the letter cited by CGNL does not constitute a waiver of the act of state defense

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4. Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597, 614 (9th Cir. 1977); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979). There is no need to determine the weight of such a statement by a foreign government in relation to the other factors mentioned in the above cited cases. We similarly express no opinion on whether an express waiver by a litigating foreign government carries more or less weight than a similar statement by a non-litigating foreign government.

by the Mexican government. Rather, it merely allows CGNL to pursue claims which might otherwise be foreclosed by the governmental order placing CGNL into receivership.

CGNL next claims that our decision in Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), cert. denied, 393 U.S. 924, 89 S.Ct. 255, 21 L.Ed.2d 260 (1968), precludes application of the act of state doctrine in this case. In Tabacalera, we held that the act of state doctrine did not preclude a federal court from entertaining a suit involving a debt by an American corporation in Florida owed a Cuban corporation, where the Cuban government had no physical control over the debt. We agree with the district court that Tabacalera does not apply here. First, the debt in Tabacalera was located in the United States, whereas here, the alleged confiscation of CGNL property occurred in Mexico. We do no accept CGNL's contention that the bond money it was required to deposit in the United States when it sought an injunction in the district court

constitutes a sufficient res. We agree with the district court that the bond money is not related to the conspiracy claim, and therefore, CGNL cannot use it to circumvent the act of state doctrine. Second, the holding of Tabacalera fits well within the "purely commercial" exception to the act of state doctrine articulated in Dunhill, supra. We hold that the act of state doctrine preclude adjudication of the conspiracy claim by our court.

As a last resort, CGNL claims that the Hickenlooper amendment, 22 U.S.C. § 2370(e)(2) (1976), a legislative exception to the act of state doctrine, applies in this case. CGNL contends that the alleged conspiracy between Entex and the Government of Mexico, resulting in the seizure of CGNL assets in Mexico without compensation, violated United States and international law, giving rise to a claim in our courts.

[4] The Hickenlooper amendment provides that unless the President of the United States suggests otherwise, or the act of state is not contrary to international law, "... no court in

the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted...." In Banco Nacional de Cuba v. First National City Bank of New York, 431 F.2d 394 (2d Cir. 1970), rev'd on other grounds, 406 U.S. 758, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972), Chief Judge Lumbard anaylzed the amendment's legislative history, and concluded that Congress intended it to be limited to cases involving claims of title with respect to American owned property nationalized by a foreign government in violation of international law, when the property or its assets were subsequently located in the United States. 431 F.2d at 399-402. See also Menendez v. Saks and Co., 485 F.2d 1355, 1372 (2d Cir. 1973), rev'd on other grounds sub nom. Alfred Dunhill of London, Inc., v. Republic of Cuba, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). Applying this principle to the present case, Hickenlooper amendment is inapplicable because neither

the nationalized property nor its proceeds are located in the United States.[5]

B. The Contract Claims

CGNL raises three issues in its contract claims.

1. The preemption issue:

[5] The first of these issues deals with federal preemption over natural gas prices sold in interstate and foreign commerce. Briefly, CGNL argues that the Texas Railroad Commission order in Docket 500 should have no effect on the price of gas charged to it by Entex because the Natural Gas Act, 15 U.S.C. § 717 et seq. (1976) preempts any local regulation of foreign commerce, and only an order by the Commission could have an effect on the price of gas sold. CGNL also argues that the filed rate doctrine renders the supplemental agreements between it and

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5. We express no opinion on whether the conspiracy claim, based on the act by the Mexican government placing CGNL in receivership amounts to a "claim of title or other right to property", or whether there has been a "confiscation or other taking" within the meaning of the Hickenlooper amendment.

Entex (or its predecessors) invalid because they were not filed with, nor approved by, the Commission. We note that CGNL raised these same arguments before the Commission in its 1976 regulatory complaint. The Commission rejected these arguments at the time, and its order was affirmed by the District of Columbia Court of Appeals. Compania de Gas v. Federal Energy Regulatory Commission, 606 F.2d 1024, 1028-29 (D.C.Cir. 1979). We hold that CGNL is collaterally estopped from relitigating the question of the federal preemption over the price of gas at issue because it had a "full and fair" opportunity to litigate this claim in the prior actions mentioned above. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5, 332-22, 99 S.Ct. 645, 649 n.5, 652, 58 L.Ed.2d 552 (1979); Montana v. U.S., 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979).[6] The fact

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CGNL's reliance on Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) is misplaced. That case deals with the "filed rate" under §§4(c) and 4(d) of the Natural Gas Act, 15 U.S.C. §§717c(c) and (d), which apply only to gas in interstate, and not foreign commerce. See 15 U.S.C. §§ 717a(6), (7); CGNL v. FERC, 606 F.2d 1024, 1029 n.6 (D.C.Cir. 1979).

that this issue is raised under the guise of a contract, rather than a regulatory claim does not disguise the fact that the issue is identical.

2. The Unconscionability Issue:

CGNL next argues that Entex interprets the pass through clause as a "blank check," passing through increases in the cost of gas without first making an effort to collect such increases from its supplier, United Gas Pipeline Co. CGNL claims that such an interpretation of the clause is unconscionable, in violation of section 2.302 of the Texas Business and Commercial Code.

[6,7] The basic test for unconscionability under that section is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Tex.Bus. & Comm.Code Ann. § 2.302, comm. 1 (Vernon 1968). The district court has concluded, and we agree, that the evidence shows that Entex has not acted in an unconscionable manner. On the contrary, Entex

provided CGNL with statements outlining the reasons for the price adjustments, including copies of Lo-Vaca's invoices to Entex, as well as periodical forecasts of the upward adjustments in the prices, in order to assit CGNL in obtaining Mexican government approval for a rate increase to its customers in Nuevo Laredo. Furthermore, the pass through provision did not result in a gross disparity between the amount paid and the consideration received; indeed, the clause served to bring the amount paid in line with the fair market value of the gas. We agree with the district court that the fact that CGNL, at the time it signed the pass through clause, had no alternative source of gas does not, by itself, render the clause or its application unconscionable. We hold that, upon the evidence presented, Entex has not interpreted the pass through clause as a "blank check,"[7] and did not act in an unconscionable

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[7] CGNL also argues that Entex has not provided it with a 60-day written notice of any price adjustments in the basic rate, thus acting unconscionably. As we mentioned in Part II, supra, however such price adjustments were automatic, therefore not requiring the 60-days notice, unlike price "increases" or "decreases," which do.

manner.

3. The Duty to Collect Issue:

CGNL next argues that Entex had a duty to attempt to collect the increases in the price of gas from the predecessor of Lo-Vaca, United Pipeline, Inc., before it passed such increases to CGNL, and further, that because it had not made any such attempt, it could not collect the increases. CGNL contends that such a duty arises from a clause in the contract between United Gas Pipeline and Entex, which states that if one of the parties assigned its interest to another (as United did to Lo-Vaca), then that party would cause the acquiring entity to faithfully perform all the obligations created by the contract.

[8] CGNL did not cite, and we have not found, any case that supports this proposition. We agree with the district court that the relevant clause in the contract is nothing more than a general restatement of the universal proposition that a party to a contract cannot escape its contractual obligations by assigning the contract to another. The assignor, in effect,

becomes a guarantor of the performance by the assignee. Tex.Bus. & Comm.Code Ann. § 2.210(a) (1968). On the evidence presented in this case, we hold that Entex had no duty to attempt to collect the increases in gas prices from United Gas Pipeline for the benefit of CGNL prior to passing them through.[8]

IV. CONCLUSION

Having addressed each of CGNL's theories, we find that the district court was correct in dismissing the tort claim, and in holding for Entex on the contractual claims.

AFFIRMED.

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[8] Our holding on the duty issue disposes of the collateral estopped and evidentiary issues raised by CGNL in parts D, E, and F of its brief. For the same reasons as stated above, we refuse to hold that the facts of the case, Entex had a duty to collect the increases in gas prices under an implied covenant of good faith and fair dealing.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

COMPANIA DE GAS DE NUEVO LAREDO, S.A.,	§	
PLAINTIFF	§	
VS.	§	CIVIL ACTION NO. 76-L-47
ENTEX, INC.,	§	
DEFENDANT	§	

FINAL JUDGMENT

It is ORDERED that Plaintiff, Compania de Gas de Nuevo, Laredo, S.A., take nothing from the Defendant, Entex, Inc. It is further ORDERED that Entex, Inc. is awarded judgment against Compania de Gas de Nuevo Laredo, S.A. on its counterclaim in the sum of $937,935.18, together with accrued interest in the amount of $297,723.70, plus attorney's fees in the amount of $5,000.00. All sums awarded shall bear interest from date hereof until paid at the rate of nine percent (9%) per annu. Court costs are taxed to the Plaintiff, Compania de Gas de Nuevo, S.A.

DONE at Laredo, Texas, this 3rd day of March, 1981.

/s/ GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

COMPANIA DE GAS DE NUEVO LAREDO. S.A.,	§	
Plaintiff	§	
VS.	§	CIVIL ACTION NO. 76-1-47
ENTEX, INC.,	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a diversity suit alleging breach of contract as well as violations of the Texas Business and Commerce Code and the Texas Deceptive Trade Practices Act. See generally 28 U.S.C. §1332(a); Tex. Bus. & Com. Code Ann. §2.302; §17.45 and 17.50. A separate count charging the Defendant with a conspiracy was dismissed by an order of the Court dated October 7, 1980. Non-jury trial was held, pursuant to due setting, on January 21, 1981. The Court now makes findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

Findings of Fact

1. Plaintiff is a Mexican corporation organized and existing under the laws of the Republic of Mexico and having its principal office in Nuevo Laredo, Tamualipas, Mexico. Defendant is a Texas corporation doing business in Laredo, Webb County, Texas, with its principal office in Houston, Texas. The amount in controversy between the parties exeeds $10,000, exclusive of interest and costs.

2. Plaintiff, Compania de Gas de Nuevo Laredo, S.A. ("CGNL"), entered into a contract with United Gas Corporation on or about May 26, 1944. The contract was for the sale of gas by United Gas to CGNL. United Gas Corporation is the predecessor in interest to the Defendant Said corporation later became United Gas, Inc. and ultimately became Entex, Inc., the Defendant. The contract was subsequently amended on various occasions by separate instruments dated January 21, 1949, December 12, 1949, June 22, 1954, March 18, 1957, November 17, 1959, May 4, 1967, August 1, 1968, and November 13, 1972. (Plaintiff's

Exhibit 1).

3. Pursuant to the terms of said contract, the Defendant was obligated to sell natural gas to the Plaintiff at a rate of $.34 for each 1,000 cubic feet of gas (Mcf) sold and delivered after February 1, 1973. This base rate was increased to $.54 per Mcf effective June 1, 1974 at 7:00 a.m.

4. In the contract amendment of August 1, 1968, section VII of the contract was amended so as to contain for the first time a "pass through" clause permitting Entex to adjust the rate upward or downward to reflect, among other things, its costs of purchasing gas for resale to CGNL. This amendment was accepted by CGNL without objection in 1968, although at that time it had no other alternate source of gas supply and therefore presumably had no real alternative. Nevertheless, at no time from August 1, 1968 until the filing of this suit in 1976 did CGNL ever protest the legality of the "pass through" provision or ever deny its applicability. It is the validity and effect of this "pass

through" provision that forms the entire basis for this lawsuit.

5. Entex's cost of purchasing gas was originally based on a contract dated February 1, 1968 between United Gas Pipe Line Company and United Gas Corporation. Shortly after the execution of this contract, United Gas Pipe Line Company assigned its interest in the contract to Lo-Vaca Gathering Company ("Lo-Vaca"). In turn, as already noted, United Gas Corporation's South Texas distribution system and its rights under the agreement subsequently became the property of Entex. This contract, in essence, provided that Entex could purchase gas at fixed rate per Mcf for five years at a time.

6. As the market price for natural gas became extremely volatile in the early 1970's Lo-Vaca eventually decided that it could no longer afford to honor fixed-rate contracts such as the February 1, 1968 agreement, for which it was responsible as assignee of United Gas Pipe Line Company. Some time in March, 1973, Lo-Vaca filed

with the Texas Railroad Commission, Gas Utilities Division, an application "to review and revise existing contracts the company has with its customers on its system, and providing for gas cost adjustment therein." This application was given Docket No. 500 with the Commission. Without attempting to analyze or even summarize what were apparently extremely complex legal proceedings, suffice to say that on September 27, 1973 the Commission approved and adopted an interlocutory order which in effect voided Lo-Vaca's existing contracts with its own customers and substituted instead a price formula substantially raising the cost of purchasing gas to all customers of Lo-Vaca, including Entex. Entex in turn began to "pass through" these increases to CGNL by virtue of the 1968 amendement to the contract between those two parties. These "pass throughs" dramatically increased CGNL's cost of purchasing gas.

7. Because of the " pass through" costs, CGNL gradually became more and more delinquent in its account with Entex. Between 1974

and June 1976, various correspondence and personal visits exchanged between CGNL and Entex representatives. At no time throughout this dialogue did CGNL ever challenge the existence or legality of the "pass through" provision. Indeed, by letter dated February 14, 1974, attorney H.C. Hall, III, representing CGNL, wrote to United Gas Company (Entex) concerning price increases. Noting that the price had "approximately tripled" in one year, attorney Hall stated that his client "assumed" that the increase was based on the contract provision "whereby United is authorized to increase the price to the buyer by an amount equal to any increase paid by seller for gas furnished to buyer under the contract." (Plaintiff's Exhibit 5). CGNL did, however, ask for full information as to the "source, price, quantities and dates of all purchases" theretofore made by United Gas (Entex). The requested information was furnished to CGNL by a letter from District Manager Virgil E. Doggette, apparently dated February 26, 1974. (Defendant's Exhibit 3). Later, in April, 1974, CGNL requested a forecast

of future rate increases in order to justify its own request for permission from the Mexican government to increase its rates to customers in Nuevo Laredo. (Defendant's Exhibit 5). In fact, CGNL did receive permission to increase its rates on several occasions, but the increases were apparently too small and too infrequent to keep up with the increasing bills from Entex.

8. By 1976, the arrearage had become so significant that on May 19, 1976, Entex sent a letter to CGNL threatening to suspend further deliveries if all amounts in arrears had not been paid prior to June 30, 1976. (Defendant's Exhibit 10). On June 28, 1976, a letter was sent from Entex to CGNL advising that since no steps had been taken by that time to settle the arrearage, gas service would be discontinued at 9:00 a.m. on Thursday, July 1, 1976. (Defendant's Exhibit 11). There was still no payment forthcoming. Instead, on July 1, 1976, the instant suit was filed by CGNL against Entex.

9. According to paragraph II of the

basic 1944 agreement between United Gas Corporation (Entex) and CGNL, the gas to be sold to CGNL is delivered at a metering station on the north bank of the Rio Grande River, i.e. on the Texas side of the international boundary. (Plaintiff's Exhibit 1).

10. By the time the "pass through" provision was inserted in the contract with CGNL in august, 1968, it was already fairly standard in the industry. CGNL was one of the last of Entex's customers to have this provision inserted in its contract. Prior to that time, various Texas municipalities and other commercial customers had a similar provision inserted in their contract. All such provisions were approved by the pertinent regulatory agencies. This type of agreement became necessary after approximately 1958. Prior to that time the market for natural gas was fairly stable. After 1958, because of certain court decisions and interantional conditions, the market became rather volatile and the need for this kind of provisions became apparent.

11. Assuming the "pass through" provision is legal, CGNL is indebted to Entex in the

amount of $937,935.18. (Plaintiff's Exhibit 13). If the "pass through" provision is not legal, then CGNL has been overcharged by the amount of $2,586,919.72 (Plaintiff's Exhibit 14). Subtracting from the latter figure the amount of money that CGNL admittedly did not pay Entex, the net amount owing to CGNL by Entex would be $1,648,984.54.

12. If either party is entitled to recover reasonable attorney's fees, the parties have stipulated that a reasonable fee in this case would be based on fifty hours' time at a rate of $100.00 per hour, for a total of $5,000.00.

13. Section VIII of the contract between CGNL and Entex, as amended May 4, 1967, provides that any past due amounts owing from buyer to seller shall accrue interest at the rate of six percent (6%) per annum from date when due until paid.

Conclusions of Law

Diversity jurisdiction clearly exists in this case. By its amended counterclaim, Entex

seeks recovery from CGNL in the sum of $937,935.18 plus pre-judgment interest, reasonable attorney's fees, and court costs. In turn, the Plaintiff attacks the validity of the contract between the parties, claims to have been overcharged, and seeks recovery of the alleged overcharge, plus interest, attorney's fees and court costs. Plaintiff's assault on the contract is based upon the following theories:

> (1) The order of the Texas Railroad Commission in Docket No. 500 should not have affected the price in gas to the Plaintiff because that gas was flowing in foreign commerce, while the Texas Railroad Commission has authority only to regulate gas flowing in intrastate commerce;
>
> (2) In any event, the "pass through" provision is unconscionable and thus unenforceable;
>
> (3) Even if the order of the Texas Railroad Commission validly allowed Lo-Vaca to charge more than the contract price stipulated in its contract with Entex's predecessor (Plaintiff's Exhibit 2), said result was nevertheless an effective breach of the contract. Although Entex would have no legal recourse against Lo-Vaca, it had the right and the duty to enforce the literal contract price against Lo-Vaca's assignor, United Gas Pipe Line Company before making any "pass through" to CGNL.

Before discussing the foregoing three theories, the Court will briefly dispose of those theories that are no longer in the case. As earlier indicated, the Plaintiff also alleged in Count Three of its First Amended Complaint that the Defendant unlawfully conspired with officials of the Mexican Government to unlawfully seize Plaintiff's assets. This cause of action was dismissed earlier by the Court. In the pre-trail order, although not found in the complaint, Plaintiff also alleges that even if the "pass through" provision was legal, the Defendant nevertheless passed on to CGNL more than its actual cost increases. At the start of the trial, Plaintiff announced that this particular theory was abandoned. Likewise there is language in paragraph VIII of the Amended Complaint that Defendant's "actions,claims, demands, collections and contract interpretation" constitute an unconscionable action and a deceptive trade practice. At trial, Plaintiff indicated that it was making no claim with respect to illegal or improper collection practices or demands for payment and the

Court finds absolutely no evidence of any kind that would support any such theory. Turning then to the three theories outlined above, the Court reaches the following conclusions:

Applicability of Texas Railroad Commission Order to Gas in Question. The only authority cited by the Plaintiff for the proposition that the orders of the Texas Railroad Commission in Docket No. 300 should have had no affect on the gas in question is the case of Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456 (1943). There the Supreme Court held that the Federal Power Commission has exclusive jurisdiction with respect to rates and charges for natural gas transported and sold in interstate commerce, by virtue of the Natural Gas Act of 1938. The Court has concluded that this particular argument is without merit. In the first place, the Texas Railroad Commission was not concerned with the sale of gas to Mexico, but rather was dealing with contract rights as between Lo-vaca and its various customers in Texas. The

contracts in question all involved sales of gas intrastate by Lo-Vaca to its various customers. The fact that one of the customers, Entex, in turn sold to one customer in Mexico, out of many thousands of customers, would hardly seem to affect the jurisdiction of the Texas Railroad Commission. Even this sale of gas from Entex to CGNL was consummated in Texas (see Finding of Fact No. 9). Further, the definition of "interstate commerce" in the federal statutes pointedly excludes foreign commerce 15 U.S.C. §717a(7), and the statutory reference to the "public interest" is different with respect to interstate and foreign commerce. See Border Pipe Line Co. v. Distrigas Corp. v. Federal Power Commission, 195 F.2d 1057 (D.C. Cir. 1974). The statute does require any person exporting natural gas from the United States to a foreign country to first secure authorization from the Federal Power Commission. 15 U.S.C. §717b. Entex had

such an authorization.[1/]

Unconscionability. Section 2.302 of the Texas Business and Commerce Code provides that if the court as a matter of law finds a provision of a contract to be unconscionable at the time it was made, the court may refuse to enforce the contract or otherwise may limit or modify the unconscionable clause. This section does not specifically define "unconscionability". Section 17.50 of the Code, the Deceptive Trade

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1/ Indeed, during the pendency of the instant suit, CGNL filed a complaint with the Federal Power Commission asking the Commission to determine the currently effective rate for the sale of gas to CGNL. See Compania de Gas v. Federal Energy Regulatory Commission, 606 F. 2d 1024 (D.C. Cir. 1979). Briefly, CGNL contended that Entex was bound by the 1944 contract and could not rely upon any of the supplemental agreements because the Commission never specifically approved of any of the supplemental agreements nor were those agreements filed with the Commission as required by law. The commission rejected these arguments and its order was affirmed by the court of appeals. Id. The court concluded that, from a regulatory standpoint, the effective rate to be charged to CGNL was not necessarily that specified in the 1944 contract. The court declined to decide the validity of any of the supplemental agreements "as a matter of contract law" because that is the issue presently before this Court. 606 F. 2d at 1030.

Practices Act, allows a consumer to sue for damages caused by "any unconscionable action or course of action by any person". §17.50(a) (3), T.B.B.C. "Unconscionable action or course of action" is then defined to mean:

> (1) action which takes advantage of a person's lack of knowledge, ability, experience or capacity to grossly unfair degree, or,
>
> (2) an act or practice which results in gross disparity between the value received and the consideration paid, in a transaction involving transfer of consideration. §17.45(5), T.B.B.C.

Comment 1 to section 2.302 of the Code states that the basic test for determining unconscionability is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Accordingly, the

Fifth Circuit has held that a court should consider the commercial setting in which the contract was formed. Fredonia Broadcasting Corp., Inc. v. RCA Corporation, 481 F.2d 781 (5th Cir. 1973).

The Court concludes that the "pass through" provision of the contract between Plaintiff and Defendant was clearly not unconscionable at the time the contract was made. All evidence is to the contrary. That is, by the time this provision was placed in the CGNL contract in 1968, it had already become virtually a standard provision in contracts executed between United Gas - Entex and all of its other customers. These customers included various municipalities throughout Texas and the contract provision was approved by the respective city governments. The Texas Railroad Commission also had occasion to approve similar provisions in other contracts. It cannot be said that the provision caused a gross disparity between value received and consideration paid. On the contrary, the precise purpose

of the provision is to bring the consideration paid in line with the cost of the gas received. Nor is there any evidence that the agreement was inserted into the contract due to the lack of knowledge, ability, experience or capacity of the CGNL personnel. Admittedly there was some indication that CGNL might not have had any real alternative other than to accept the amendment, but the Court cannot find that this alone renders the provision unconscionable. Indeed, the provision in principle seems no different from other "escalator" clauses that are almost universal in our society, such as contracts containing a cost-of-living escalator feature and loan agreement tying interest to a floating prime rate. Concluding as a matter of law that the "pass through" provision was not unconscionable, the Court will not dwell on the issue, earlier raised by the parties, of whether the Texas Deceptive Trade Practices Act is relevant to this case inasmuch as the term "consumer" under that Act did not include a partnership or corporation

until 1975.

Entex's Obligation To Claim Against United Gas Pipe Line Company. Plaintiff's third theory is the most difficult to analyze conceptually. It does not explicitly appear in Plaintiff's First Amended Complaint. Plaintiff's trial brief suggests that this theory is actually based on two provisions of the Texas Business and Commerce Code, namely section 1.203, which imposes a general obligation of good faith in the performance or enforcement of any contract within the scope of the Code and section 1.201(19) which defines "good faith" to mean honesty in fact in the conduct or transaction.

Plaintiff then calls attention to the original 1968 contract between United Gas Pipe Line Company and United Gas Corporation (Plaintiff's Exhibit 2). Article IX therein generally provides that if United Gas Pipe Line Company ever sold or exchanged its system and thereby became unable to supply gas to United Gas Corporation (Entex's predecessor), then the pipeline company

agreed to cause its successor to faithfully perform the obligations created under the agreement. It would appear that this provision is nothing more than a general restatement of the universal proposition that a party to a contract cannot escape its obligations by assigning the contract to another. The assignor in effect becomes a guarantor of performance by the assignee. See Section 2.210(a), T.B.B.C.; 6AM. JUR. 2d Assignments §110 (1963). Plaintiff argues that the obligation of "honesty" and "good faith" required Entex to do two things, first, to advise CGNL of the contents of Article IX of the 1968 contract and second, to "pursue" that provision by demanding that United Gas Pipe Line Company in effect reimburse Entex for the additional money it began to pay to Lo-Vaca as a result of the Railroad Commission order. Put another way, Plaintiff says that when Lo-Vaca received permission from the Texas Railroad Commission to charge more than contract price for its gas, Entex should have then taken step against United Gas Pipe

Line Company to reimburse Entex for the difference between the contract price and the new higher price allowed by the Railroad Commission. Under this theory, as urged in Plaintiff's trial brief, Entex did not actually incur a cost increase on the gas purchased from Lo-Vaca "unless and until such time as it exhausted all efforts to collect on the guarantee of United Pipeline Gas Company [sic] and was unable to collect."

One difficulty with this theory is that it at least implies that CGNL was a third-party beneficiary of the original contract between United Gas Pipe Line Company (Lo-Vaca's predecessor) and Untied Gas Corporation (now Entex). Yet, the Plaintiff has already sued United Gas Pipe Line Company based on essentially the same contention. That suit was Civil Action No. L-77-57 in this Court, sytled Compania de Gas de Nuevo Laredo, S.A. v. Pennzoil Co. and United Gas Pipe Line Company, and filed on September 26, 1977. The only difference between that suit and the theory presently before the Court is that in L-77-57, the Plaintiff alleged the United Gas Pipe Line

Company was directly liable to it for Lo-Vaca's failure to faithfully perform under the contract. In January, 1978, presiding Judge Robert O'Conor, Jr. dismissed plaintiff's complaint for failure to state a cause of action. This dismissal was affirmed by the Fifth Circuit on February 6, 1980, Cause No. 78-1376, in an unpublished per curiam opinion under the Fifth Circuit's Local Rule 21.

It is difficult to escape the conclusion that Plaintiff's theory in the instant case is simply a renewal of the third-party beneficiary notion in a new setting. Whether the Plaintiff sues United Gas Pipe Line Company itself or merely urges that Entex had a duty to do so, the fundamental premise underlying both propositions is that the 1968 contract between United Gas Pipe Line Company and Entex's predecessor is one that inured to the benefit of CGNL and therefore can be used by CGNL as an offset to Entex's claim in this case. To that extent Plaintiff's theory would be foreclosed by the

doctrine of collateral estoppel. See Montana v. United States, 440 U.S. 147, 153 (1979).

A second difficulty with this particular theory is the assumption that the problem between Lo-Vaca and Entex was a simple breach of contract. The evidence in the case, such as it was, suggests a much more complicated situation. The evidence indicates that by the early 1970's, long-term, fixed-price contracts for the sale of natural gas had essentially become obsolete. Because of certain court decisions and because of the international energy picture, the market price for natural gas not only increased tremendously but also became very volatile. Apparently, Lo-Vaca presented itself to the Texas Railroad Commission because it simply became economically impossible to meet its contractual obligations. Thus the interim order entered by the Commission on September 27, 1973 (Plaintiff's Exhibit 7) spoke of a "public emergency and imperative public necessity" requiring that temporary rates be established. The order further provided that any excess revenues collected by Lo-Vaca would be

subject to refund at a later date if lower rates were subsequently deemed to be in the public interest. The final order of the Commission was dated September 4, 1979 (Plaintiff's Exhibit 11). It recites that the initial interim order was indeed rescinded at one point but that order itself was then amended and eventually motions for rehearing were granted. Finally, a settlement plan was approved and, according to the Commission, customers representing "in excess of 99%" of Lo-Vaca's 1975 sales volume had indicated their support of the settlement. Moreover, various elected officials and the State Attorney General urged adoption of the plan. Among other things, the final order announced a finding by the Commission that "the public interest requires that a new rate become effective as of the Settlement Date which would consist of a fixed amount (cost of service factor) per Mcf of gas sold plus cost of gas with a purchased gas adjustment (PGA) clauses which would cause the price to a customer to vary with changes in cost of gas to the Lo-Vaca system." Paragraph 16, Final Order Plain-

tiff's Exhibit 11). In other words, it could be argued with some plausibility that the fate which befell Lo-Vaca in 1973 was something which it could not have prevented or overcome by the exercise of due diligence. If so, this would fit within the definition of "force majeure" in paragraph 11.1 of the United Gas Pipe Line contract of 1968 (Plaintiff's Exhibit 2). In that event, paragraph 11.2 therein would arguably relieve either Lo-Vaca or United Gas Pipe Line Company from any legal liability under the contract itself.

A third and corollary difficulty is that Plaintiff's theory essentially requires a good deal of speculation on the part of the Court. Implicit in Plaintiff's theory is that had Entex wanted to, it could have made a demand upon United Gas Pipe Line Company and would have successfully prevailed in any litigation demanding reimbursement for the difference between the 1968 contract price and the new price allowed by the Railroad Commission. There is, however, no evidence that would necessarily support such a

conclusion. On the contrary, from what little evidence there is in the record, the Court finds it just as easy if not more likely to conclude that had Entex made any such claim against United After 1973, United could and would have gone to the Texas Railroad Commission and obtained essentially the same relief that Lo-Vaca obtained. Certainly there is nothing in the record that establishes a contrary conclusion.

In Texas, the "good faith" definition has been strictly construed, so that neither lack of diligence, negligence, nor even gross negligence can constitute lack of good faith. Aetna Life & Casualty Co. v. Hampton State Bank, 497 S.W.2d 80, 87 (Tex. Civ. App. 1973, writ ref. n.r.e.); Richardson Company v. First National Bank in Dallas, 504 S.W.2d 812, 816 (Tex. Civ. App. 1974, writ ref. n.r.e.); First State Bank & Trust Co. v. George, 519 S.W.2d 198, 203 (Tex. Civ. App. 1974, writ ref. n.r.e.). For all the reasons discussed above, the Court concludes that there is no evidence that Entex did or failed to do anything that could be considered "dishonest in fact."

Attorney's Fees. Having concluded that Plaintiff's three grounds for attacking its contract with Entex are without merit, the Court necessarily concludes that Entex is entitled to recover the undisputed amount of money owing. Under Texas law, any corporation having a valid claim against another corporation for services rendered or material furnished or having prevailed in a suit founded on a written contract is entitled to recover reasonable attorney's fees so long as the amount owing had not been tendered within thirty days after presentment of the claim. Article 2226, V.A.T.S. No particular form of presentment is required. Huff v. Fidelity Union Life Insurance Company, 312 S.W.2d 493 (Tex. Civ. App. 1976, writ ref. n.r.e.). The Court concludes that there was adequate presentment in this case, together with lack of payment, and concludes that all of the requirements of the statute have been met. Thus, Defendant is entitled to recover attorney's fees in this case.

Conclusion. To the extent that any of the

foregoing Findings of Fact should be deemed Conclusions of Law, they are adopted as such, and vice-versa. Judgment shall be entered for Entex on its counterclaim. The Court is prepared to enter final judgment at this time based upon the foregoing findings and conclusions, except for the matter of calculating pre-judgment interest. While the simple solution would be to commence the calculation of interest from the date of the last entry on the account, literally the Defendant is entitled to a calculation of interest on each monthly charge, at such time as that particular charge became delinquent. Any payments by the Plaintiff, however, would then cause the accumulated interest to be eliminated or reduced. Ascertaining the precise amount in question will require a somewhat complicated mathematical calculation. Accordingly, Entex is directed to file with the Court no later than February 23, 1981 its proposed calculation of pre-judgment interest, with a copy of such calculation to be promptly delivered to CGNL. The latter shall in turn be

allowed until February 27, 1981 at 5:00 p.m. within which to file any alternate proposal, if it deems the calcualtions of Entex to be incorrect. The Court at that time will determine whether any further hearing is required or whether final judgment can be entered. If, of course, the parties can resolve the question of pre-judgment interest sooner than the foregoing deadlines, they are encouraged to do so and advise the Courth forthwith.

DONE at Laredo, Texas, this 17th day of February, 1981.

/s/ GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
OCT 21 1982
GILBERT F. GANUCHEAU
CLERK

No. 81-2176

COMPANIA DE GAS DE NUEVO LAREDO, S.A.,
Plaintiff-Appellant,

versus

ENTEX, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(October 21, 1982)

Before THORNBERRY, REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS M. REAVLEY
United States Circuit Judge

§ 717. Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural

gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such

regulatory power or jurisdiction. June 21, 1938, c. 556 § 1,52 State. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

§ 717b. Exportation or importation of natural gas

After six months from June 21, 1938 no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

June 21, 1938, C. 556 § 3, 52 Stat. 822.

§ 717c. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such

time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect without requiring the thirty days' notice

herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it is so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision therein, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either

completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to finish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accruate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rate or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of

proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

June 21, 1938, c. 556, § 4, 52 State. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.

Agosto 24 de 1976

HALL Y ZAFFIRINI
P R E S E N T E.

Por medio de la presente y ha solicitud de ustedes, en mi -- carácter de Administrador Oficial designado por la Secretaría de Industria y Comercio en la Compañía de Gas de Nuevo Laredo, me -- permito manifestar lo siguiente:

1o.-Por Decreto Presidencial de 13 de julio, pasado, se declaró de utilidad pública, la ocupación inmediata, total y temporal de los bienes y derechos de - la Compañía de Gas de Nuevo Laredo, S.A. Dicho Decreto se ejecutó en la empresa referida el 14 de - julio de 1976.

2o.-La ocupación de la Compañía de Gas de Nuevo Laredo, S.A. y su Administración Oficial, no limita el derecho de los representantes de ésta, para efectuar toda clase de gestiones Administrativas, Judiciales y Extra Judiciales, ante Cualquier autoridad - bien sea Nacional o Extranjera, para dilusidar o - resolver cualquier tipo de conflicto surgido antes de la ocupación total o temporal de la empresa, ni para llegado el caso, gestionar el levantamiento - de esta medida.

A t e n t a m e n t e,

/s/
C.P. CESAR APONTE ROBLES ARENAS
ADMINISTRADOR

c.c.p. C. Lic Carlos Fabre del Rivero,
Oficial Mayor de la Secretaría
de Industria y Comercio

c.c.p. C. Lic. José Dosal de la Vega,
Sub-Director Técnico de la
Dirección de Asuntos Jurídi
cos de la Secretaría de In-
dustria y Comercio.

August 24, 1976

HALL AND ZAFFIRINI
Personal Delivery

By these presents, and at your request, in my capacity as Official Administrator appointed by the Department of Industry and Commerce, of Compania de Gas de Nuevo Laredo, I hereby certify as follows:

1. By Presidential Decree of the 13th day of July of the current year, it was declared, as public convenience, the immediate, total and temporary possession of the assets and rights of Compania de Gas de Nuevo Laredo, S.A. Said Decree was executed at said above referred to company on the 14th day of July, 1976.

2. The possession of Compania de Gas de Nuevo Laredo, S.A. and its Official Administration do not limit the rights of the representatives of said company to initiate and prosecute all types of Administrative, Judicial and Extra Judicial actions before any authority, whether it be National or Foreign, to elucidate or resolve any type of conflict which arose prior to the total and temporary possession of said company, nor, should the need arise, to initiate efforts to terminate said possession.

Respectfully,

/s/
C.P. CESAR APNTE ROBELS ARENAS
Administrator

cc: Lic. Carlos Fabre del Rivero
Executive Officer of the
Department of Industry and Commerce

cc: Lic. Jose Dosal de la Vega
Deputy Director, Board of Judicial Matters
of the Department of Industry & Commerce

82-1340

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

COMPANIA DE GAS
DE NUEVO LAREDO, S.A.,

PETITIONER,

VS.

ENTEX, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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Questions Presented For Review

1. Did the Court of Appeals correctly hold that the act of state doctrine precludes a review of the Mexican government's taking possession of Petitioner's assets in Mexico?
2. Did the Court of Appeals correctly hold that Petitioner was collaterally estopped from relitigating the question of federal preemption over the price of gas determined by the Texas Railroad Commission?
3. Did the Court of Appeals correctly hold that Respondent had no contractual duty to institute litigation against Respondent's previous gas supplier in an attempt to minimize increases in the price of gas sold by Respondent to Petitioner?

Table of Contents

Table of Authorities

Statement of the Case

Petitioner's "Statement of Fact" in its Petition to this Court is generally incomplete and misleading as a statement of the case. Respondent therefore relies upon the Fifth Circuit's opinion below for a true exposition of the operative and dispositive facts.[1/]

1/ As an example of a misleading statement, Petitioner states on page 7 that its contentions before the Federal Energy Regulatory Commission were rejected by the Administrative Law Judge. In fact, the ALJ, the Agency and the Court of Appeals for the D. C. Circuit rejected its arguments. See Compania de Gas de Nuevo Laredo, S.A. v. Federal Energy Regulatory Commission, 606 F.2d 1024 (D.C. Cir., 1979).

As a further example of the misleading nature of Petitioner's "Statement of Fact", the Petition is replete with argument that Respondent committed unnamed acts of "corruption" in its relations with the Republic of Mexico.

[Footnote 1/ continued on next page]

Summary of Argument

Petitioner argues, first, that this Court should engraft a "corruption exception" to the act of state doctrine. This proposed "exception" is calculated to and assuredly

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Footnote 1/ (continued from previous page)

> As the record itself reflects, there has never been any showing nor any evidence, of any kind or character, of any corrupt act or other wrongdoing by Entex or its counsel, or by the President or any other governmental official of the Republic of Mexico. Such statements in the Petition, in fact, are simply untrue and are regurgitated in an obvious attempt to lend credence to Petitioner's claim for relief. As the Court of Appeals specifically concluded in its opinion, . . . "the Mexican government, by taking possession of [Petitioner's] assets, acted in an emergency to insure that the citizens of Nuevo Laredo receive uninterrupted service of natural gas." Compania de Gas de Nuevo Laredo, S.A. v. Entex, 686 F.2d 322, 326 (5th Cir. 1982).

will exascerbate the very harm the doctrine is specifically intended to avoid. In the total absence of any proof or showing of corruption of any sort in the record below, no such "exception" should be created or entertained by this Court. In this case, there is and was no corruption of any kind.

Second, Petitioner contends that this case involves a question concerning Federal preemption of State regulation of gas prices. The Court of Appeals and the District Court both have held that the Petitioner, having previously litigated these contentions and lost, is now collaterally estopped from relitigating those same issues. Collateral estoppel was correctly applied by the Courts below.

Lastly, the Courts below correctly held that Petitioner's contract law argument (i.e., that Respondent should be forced to sue its gas suppliers for allegedly "unlawful" and "impermissible" gas price increases which were passed through to Petitioner) is insupportable under the applicable State law. Further it is obvious that this assertion raises no Federal concern and involves only particular conduct of the parties under a specific contractual provision.

Argument

I.

Act of State Doctrine

Petitioner contends that the act of state doctrine should be subject to an exception, in favor of foreign private citizens, "when [foreign] governmental

acts in question are procured through corruption." The only support cited is dictum found in one District Court case 2/ bolstered by arguments of Petitioner's own creation. In short, Petitioner claims that foreign relations with other nations would be enhanced because of the gratitude those nations would have toward the United States if its courts would assume jurisdiction to investigate and expose corrupt practices taking place within a foreign nation.

The opinion of the Fifth Circuit concerning this "issue" is both well considered and correct. In this case, there was no corrupt act of any kind. Further, as this Court has recognized

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2/ Dominicus Americano Bohio v. Gulf & Western Industries, Inc., 473 F.Supp 680 (S.D.N.Y. 1979).

since 1917, Oetjen v. Central Leather Corp., 246 U.S. 297, it is central to the doctrine that the very fact of inquiry into the conduct of the affairs of a foreign sovereign is potentially officious and offensive. Finally, the inquiry is foreclosed because, as in this case, our courts are without power to remedy the supposed or alleged wrong.[3/] But the central fallacy of Petitioner's argument here is the total absence of any proof or evidence in this proceeding of any corruption or wrongdoing by any foreign official or by Entex or its representatives in dealing with the Republic of Mexico in connection with the matters at issue.

3/ For example, Petitioner has yet to pay one cent of the costs taxed against it in any of the protracted agency and court proceedings filed by it in this controversy.

Petitioner's second argument, that the Foreign Corrupt Practices Act (Pub. L. No. 95-213, 91 Stat. 1494 (1977) codified in various sections of 15 U.S.C.) is not "fair and just [in] that only the U.S. Justice Department, under CPA, can have an exception to the act of state doctrine to investigate and prosecute corrupt foreign officials in criminal proceedings . . ." Petition, p. 13. This argument should be addressed to Congress, not the Court.

Finally, in attempting to bolster its specious arguments, Petitioner argues that the Sovereign has authorized or "consented" to an adjudication of the "corruption" issue in the U.S. Courts. Petitioner relies upon a single piece of correspondence in the record, written to Petitioner's counsel by the Official Administrator of

Petitioner's company, as establishing that the Republic of Mexico had waived its sovereignty and has granted to the Courts of the United States the power to terminate the receivership over Petitioner's company established by decree of the President of the government of Mexico in 1976. This is ludicrous on its face.

In summary, Petitioner's argument with respect to the creation of a private remedy in the Courts of the United States whenever unproven allegations of "corruption" are lodged against the officials of a foreign sovereign by one of its citizens are totally devoid of any merit. The decisions of the Courts below are clearly correct. The Petition should be in all things denied.

II.

Collateral Estoppel

The Court of Appeals properly declined to address the merits of the regulatory issues which Petitioner is asking this Court to pass upon in the second part of its argument in brief. The court below held that Petitioner was collaterally estopped from relitigating these issues, citing earlier dispositive action on such issues by the Federal Energy Regulatory Commission and the Court of Appeals for the District of Columbia. Compania de Gas de Nuevo Laredo, S.A. v. Federal Energy Regulatory Commission, 606 F.2d 1024 (D.C. Cir. 1979). The discussion by the Court of Appeals is correct and the matter need not be discussed again, just as the regulatory matters raised by Petitioner need not be litigated again.

III.

Texas Contract Law and "Good Faith"

Petitioner's third point, that Respondent breached its gas sales agreement with Petitioner by failing in "good faith" to sue the predecessor-in-interest to Respondent's gas supplier for breach of contract--a course of action Petitioner posits would have kept down Petitioner's gas costs--arises under Texas contract law and involves no considerations listed in Rule 17 as justifying further review by this Court. Petitioner's totally unsupported observation at page 28 of its petition that "this type of situation is probably common across the nation," as indicative of a significant "federal" question, does nothing to alter this conclusion. In any event, review by this Court of the state law question would

have very limited impact because the issue raised, contractual "good faith," is determined on a case-by-case basis. Respondent therefore urges the Court to dismiss the petition as to this point.

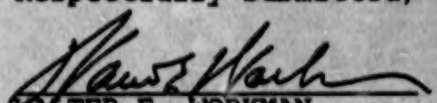
Conclusion

Respondent urges the Court to dismiss Petitioner's petition for writ in its entirety. The Court of Appeals correctly decided all three issues before this Court. The single issue which warrants even cursory attention -- and resolution of which is clear upon analysis -- concerns the corruption exception to the act of state doctrine. The other two issues involve either a clear instance of collateral estoppel or state, not federal, law. Respondent has argued that recognition by this Court of this exception would be

contrary to precedent (except for one district court case), unwise, because contrary to the purposes of the doctrine, and otherwise not appropriate in this case.

The Petitioner's Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of this brief are being served upon counsel for Petitioner, Messrs. C. M. Zaffirini and E. R. Cuellar, at the firm of Zaffirini and Cuellar, P. O. Box 627, Laredo, Texas 78042-0627, on February 18, 1983, in accordance with the rules of this Court.

Walter E. Workman